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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON E. EDMOND,

Petitioner,

v.

THE UNITED STATES OF AMERICA
AND OTHER CASES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. May the Secretary of Transportation use a general residual appointment statute to appoint civilian members of the Coast Guard Court of Criminal Appeals, where another statute specifically applies to such appointments, but cannot be used because it admittedly violates the Appointments Clause?

2. Are judges of the military Courts of Criminal Appeals "inferior officers" under the Appointments Clause even though, as a practical matter, their decisions are almost always the final word on criminal convictions in the military?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

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CGCCA Dkt. No. 999

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CGCCA Dkt. No. 1053
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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions of the lower courts in these six cases, including the citations to all published opinions, are identified in the petition (pp. 1-3) and included as appendices to the petition (Pet. App. 1a-67a). The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Ryder*, 44 M. J. 9 (1996), which explains the reasoning of that Court and is the basis on which the decisions under review were rendered, was not reproduced in the petition,

but is reproduced as an Addendum to this brief (Add. A1-A5) for the convenience of the Court.[1]

JURISDICTION

The decisions of the Court of Appeals for the Armed Forces were issued on May 21 and June 27, 1996. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990). The petition was filed on August 16, 1996, and review was granted on November 8, 1996.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Article II, § 2, cl. 2, provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[1] Effective October 5, 1994, the name of the United States Court of Military Appeals was changed to the United States Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 924, 108 Stat. 2663, 2831 (1994). This brief will refer to those Courts generically under their current names and will use the actual name of the Court when referring to a particular decision.

The relevant provisions of the Uniform Code of Military Justice, Article 66, 10 U.S.C.A. § 866 (West 1995), provide in pertinent part:

> (a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as senior judge on each panel.
>
> * * *
>
> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine

controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals orders a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

* * *

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by the Courts of Criminal Appeals.

The relevant provision of Title 49 of the United States Code, 49 U.S.C. § 323(a) (1988), provides:

> The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

STATEMENT OF THE CASE

This is a consolidated proceeding involving six Coast Guard members of varying ranks whose court-martial convictions were affirmed by the Court of Appeals for the Armed Forces on May 21 and June 27, 1996. *See, supra* at page ii. In each case, that Court granted review and rendered adverse summary dispositions in light of *United States v. Ryder*, 44 M.J. 9 (1996). Each case is factually

distinct, but the facts critical to a resolution of the issue presented to each are identical. Each case involved conviction and sentence by a general or special court-martial. Each case was reviewed in the Coast Guard Court of Criminal Appeals by a panel consisting of commissioned officers and at least one civilian judge.[2]

Knowledge of three military cases is necessary to a full understanding of the issues presented in this case: *Weiss v. United States*, 114 S. Ct. 752 (1994); *Ryder v. United States*, 115 S. Ct. 2031 (1995); and *United States v. Ryder*, 44 M.J. 9 (1996). In *Weiss*, this Court upheld the decision of the Court of Military Appeals which had affirmed the petitioners' conviction. The petitioners argued that the appointments of the military trial and appellate judges who heard and reviewed his case had not been made in compliance with the Appointments Clause of the Constitution. *Weiss*, 114 S. Ct. at 754-55. This Court concluded that the Appointments Clause applied to the appointment of military trial and appellate judges, but that appointment as a commissioned officer of the armed forces, with the advice and consent of the Senate, satisfies the Appointments Clause for those judges who are commissioned officers on active duty. Id. at 757, 760. However, the Court specifically noted that its ruling did not apply to the appointment of civilians to service courts of military review: the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. 866(a). It is not at issue here." *Id.* at 757 n.4.

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[2]In recent years, only the Coast Guard has had civilian appellate judges, although the Navy has had civilian appellate judges in the past. 2 F. Gilligan & F. Lederer, *Court-Martial Procedure* 140 n.99 (1991). Judges who preside at courts-martial are military officers. Article 26 UCMJ, 10 U.S.C. § 826.

On January 15, 1993, shortly after the decision of the Court of Military Appeals in *Weiss*, the Secretary of Transportation signed a memorandum which "adopted" the prior appointments of the Coast Guard Court of Military Review judges as "appointments of [his] own." *See United States v. Carpenter*, 37 M.J. 291, 300 (C.M.A. 1993). This memorandum, a copy of which is attached in the Addendum to this brief at A6, was prepared and signed by the Secretary upon the suggestion of the judges of the Coast Guard Court of Military Review. *United States v. Senior*, 36 M.J. 1016, 1018 (C.G.C.M.R. 1993).

In *Carpenter*, the Court of Military Appeals considered the validity of the pre-January 15, 1993 appointment of civilian Court of Military Review judges. 37 M.J. at 293. Until that date, the civilian judges on the Coast Guard Court of Military Review, including Chief Judge Baum who sits on all cases in that Court, were appointed by the General Counsel of the Department of Transportation, who also serves as the Judge Advocate General of the Coast Guard, which is part of the Transportation Department. The Court of Military Appeals concluded that civilian appointments to the Courts of Military Review were defective because the appointment was not made by any of the officers specifically empowered in the Appointments Clause to appoint inferior officers — the President, the head of a department, or a court of law. Id. at 295. However, the Court concluded that no relief was necessary, because, relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), it afforded *de facto* validity to the acts of the civilian judges. The Court also referred to the January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum, and suggested that this remedied the Appointments Clause violation because the Secretary of Transportation is the head of the Department in which the Coast Guard is lodged. *Carpenter*, 37 M.J. at 294 n.1.

This Court addressed the propriety of affording *de facto* validity to the acts of unconstitutionally appointed appellate military judges in *Ryder v. United States*, 115 S.Ct. 2031 (1995). The Court concluded that the *de facto* officer doctrine did not apply to the acts of the improperly-appointed civilian judges, at least in criminal cases in which the issue was raised while the case was on direct review. *Ryder* required new reviews by the Coast Guard Court of Criminal Appeals with properly-appointed judges for all cases still on direct review that were decided before the January 15, 1993, memorandum of the Secretary of Transportation.

Both *Carpenter* and *Ryder* were decided by the Coast Guard Court of Military Review before January 15, 1993. Therefore, the validity of the memorandum of the Secretary of Transportation issued on that date, which purports to appoint the civilian judges of that Court, was not at issue, and the comment in *Carpenter* suggesting its validity was simply *dicta*.

On remand from this Court in *Ryder*, the Court of Appeals for the Armed Forces, as part of its decision to remand the case to the Coast Guard Court of Criminal Appeals, considered whether Chief Judge Baum, the remaining civilian judge on the Coast Guard Court, is now properly appointed by virtue of the Secretary's January 15, 1993 memorandum. The Court concluded that judges of the Courts of Criminal Appeals are inferior officers of the United States, and that the Secretary of Transportation has the statutory authority to appoint those judges. *Ryder*, 44 M.J. at 11. The Court relied on Justice Souter's concurring opinion in *Weiss* for its determination that the judges of the Courts of Criminal Appeals are inferior officers. *Id.; Weiss*, 114 S. Ct. at 769 (Souter, J., concurring). For its conclusion that the Secretary had authority to appoint civilian judges, the Court cited 49 U.S.C. § 323(a), the general statutory provision permitting the Secretary of Transportation to appoint subordinates in the Department of Transportation. *Ryder*, 44 M.J. at 11-12. As a result, it remanded *Ryder* to

the Coast Guard Court of Criminal Appeals where Ryder's conviction was to be reviewed again, this time by a panel who would, in the opinion of the Court of Appeals for the Armed Forces, be properly appointed, even if it included Chief Judge Baum.

In each of the cases now before the Court, the court-martial conviction and sentence was affirmed by a panel of three judges of the Coast Guard Court of Criminal Appeals or Court of Military Review, depending on when the decision was rendered. Each panel included Chief Judge Baum, a civilian, and two other judges. In *Lazenby* and *Leonard* the panels also included Judge Bridgman, the Coast Guard Court's other civilian judge, who has since retired. The other judges in these cases were active-duty commissioned officers. Each of the decisions was issued after January 15, 1993, so that the appointment of the civilian judges was covered by the Secretary's 1993 memorandum and the *dicta* in *Carpenter*. On further discretionary appeal to the Court of Appeals for the Armed Forces, solely on the Appointments Clause issues, that Court affirmed, relying on its recent decision on remand in *Ryder*.

SUMMARY OF ARGUMENT

The first question decided by the Court of Appeals and presented in the petition was the constitutional question whether judges of the military Courts of Criminal Appeals are principal or inferior officers, and the second question was whether the statutory authority relied on by the Government could be used to appoint civilian judges to the Coast Guard Court of Criminal Appeals. In this brief we reverse that order since it is preferable for courts to decide cases on statutory rather than constitutional grounds whenever possible. Moreover, the existence of a substantial constitutional question provides a further reason for the Court to read the applicable statutes in order to avoid reaching the constitutional challenge.

1. Under Article 66(a) of the UCMJ, Congress provided that the Judge Advocate General for each of the armed services, including the Coast Guard, is to appoint military appellate judges, and that direction was uniformly followed since its passage in 1951 until January 1993. By contrast, 49 U.S.C. § 323(a), relied on by the Government, is a general residual appointment provision, which makes no mention of military judges and which was first invoked only after the constitutional status of civilian appellate judges in the Coast Guard was challenged. In cases such as this, the Court has applied the specific statute to the exclusion of the general one, and it should do so here, especially since there is nothing in the legislative history of either provision that would lead to a contrary conclusion.

Furthermore, accepting the rationale urged by the Government would mean that some members of the Coast Guard Court of Criminal Appeals would be appointed by the General Counsel of the Transportation Department and others, including the Chief Judge, by the Secretary of Transportation, an unusual if not unprecedented situation. The incongruity of such a result is underscored, among other things, by the fact that Article 66(a) also provides that the Judge Advocate General shall select the Chief Judge of that service's Court of Criminal Appeals and that the power to issue rules of practice for all the military Courts of Criminal Appeals is lodged collectively in all of the Judge Advocates General. Article 66(f).

2. If the Court rejects petitioners' statutory claims, it should nonetheless reverse because the judges of the Courts of Criminal Appeals are principal officers under the criteria set forth in *Morrison v. Olson*, 487 U.S. 654 (1988). Their appointments are for indefinite terms, and while some military officers tend to serve relatively brief tours as military appellate judges, the civilians on the Coast Guard Court of Criminal Appeals serve for quite lengthy periods. Most significantly, the Courts of Criminal Appeals have a wide-ranging power of review of both convictions and

sentences in courts-martial that is broader than the federal Courts of Appeals have in non-military criminal cases. Their jurisdiction requires them to consider the entire UCMJ, other provisions of federal and in some cases state criminal law, as well as applicable provisions of the Constitution. And, there is no one who is "superior" to them since there is no appeal as of right to a higher court from their decisions. The only further review is discretionary by the United States Court of Appeals for the Armed Forces.

This Court's decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), confirms the conclusion that judges of the Courts of Criminal Appeals are principal not inferior officers. In *Freytag*, the issue was whether, if special trial judges of the Tax Court were inferior officers (as the Court held), were they properly appointed by the Chief Judge of the Tax Court (as the Court also held). For purposes of this case, *Freytag*'s significance is that the Court implicitly ruled that the Chief Judge of the Tax Court is a principal officer, since only those principal officers listed in the Appointments Clause may appoint inferior officers.

To determine whether the judges of the military Courts of Criminal Appeals are principal officers, the Court should compare the relevant aspects of the powers, responsibilities, and terms of office of Tax Court judges and those on the Courts of Criminal Appeals. In most respects, the offices are quite similar, but the fact that decisions of the Tax Court are reviewable as of right in Circuit Courts of Appeals, whereas those of the military appellate courts are subject to only discretionary review, makes the case for designating military appellate judges principal officers at least as strong, if not stronger, than for concluding that Tax Court judges have that status.

ARGUMENT

THE CIVILIAN JUDGES WERE NOT LAWFULLY APPOINTED TO THE COAST GUARD COURT OF CRIMINAL APPEALS.

I. THE SECRETARY OF TRANSPORTATION HAS NO STATUTORY AUTHORITY TO APPOINT COAST GUARD MILITARY APPELLATE JUDGES.

The Appointments Clause permits the appointment of inferior officers by means other than Presidential nomination and Senate confirmation only when Congress has so provided "by Law." U.S. Const. Art. II, § 2, cl. 2. Even then, Congress may lodge the appointment power for inferior officers only in one of the three categories of principal officers designated in the Constitution — the President alone, the head of a department, or a court of law. *Id.* Absent such a law, the authority to appoint remains with the President, subject to the advice and consent of the Senate. Similarly, if Congress provides for the appointment of an inferior officer, but assigns the power to a person not listed in the Appointments Clause, that provision has no effect, and the residual appointment power of the President, with the advice and consent of the Senate, applies. *Id.*; *Appointment of Assistant Assessors of Internal Revenue*, 11 Op. Att'y Gen. 209 (1865). As this Court has held, there is no inherent authority in the head of a department to make appointments of officers in that department. *United States v. Perkins*, 116 U.S. 483 (1886).

The current version of Article 66(a), which creates the Courts of Criminal Appeals, does not contain the term "appoint," but instead uses "establish," which is similar to the term "constitute" used in the prior version. Despite this arguable ambiguity, for more than forty years since the UCMJ was enacted, the practice was uniformly clear: until

January 15, 1993, all military appellate judges were selected for their offices, and in the case of civilian judges, actually appointed to their positions, by the Judge Advocate General of their particular service pursuant to Article 66(a).

Under this longstanding interpretation that Article 66(a) provided a power of appointment, *see United States v. Wheeler*, 6 C.M.R. 464 (1952), the General Counsel of the Department of Transportation, who is the Judge Advocate General of the Coast Guard, Article 1(1), UCMJ, 10 U.S.C. § 801(1), appointed all the judges of its appellate court, civilian and military, including its current Chief Judge, Joseph H. Baum, who has held that position since April 1, 1985. Add. A6. This consistent practice changed on January 15, 1993, when the Secretary of Transportation, at the urging of all of the judges of the Coast Guard Court of Military Review, *see Senior v. United States*, 36 M. J. 1016, 1018 (C.G.C.M.R. 1993), reappointed all of the Coast Guard's appellate judges in order to avoid the Appointments Clause problems raised in *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992). Add. A6. That appointment "adopted" the five judicial appointments of the General Counsel of April 20, 1992 "as judicial appointments of my own" and included both Judge Baum, who was appointed as Chief Judge, and Alfred Bridgman, another civilian who has since retired. *Id.* Although the appointments are not for stated terms of office, the civilian appellate judges in the Coast Guard have had very long tenures.[3]

Although not cited in the appointing memorandum, the statute relied upon by the Government to support the Secretary's appointments here is 49 U.S.C. § 323(a). That

[3] In addition to Chief Judge Baum, who has already served nearly 12 years, Alfred Bridgman served almost 17 years (September 1978 - July 1995), Clinton Maguire served almost nine years (August 1969 - May 1978), and Arthur Rosenwasser served more than 26 years (June 1951 - December 1977). Throughout this period, the Chief Judge has always been a civilian.

statute does not mention the office of appellate military judge, or even the Coast Guard. It is a general provision that would appear to permit the Secretary of Transportation to "appoint and fix the pay" of *all* "officers and employees of the Department of Transportation ... ." It may be used to justify the appointment of Judge Baum only if (a) military appellate judges are inferior officers, *and* (b) the statute applies to that office. In Point II we explain why judges of the Courts of Criminal Appeals are principal officers, but the existence of that substantial constitutional question is a further basis to construe § 323(a) in a manner that will enable the Court to avoid having to decide that question. *Department of Justice v. Public Citizen*, 491 U.S. 440, 465-66 (1989). In this section of the brief, we demonstrate that this catch-all provision cannot reasonably be construed to apply to these appointments, even if it were constitutional to do so.

A. Properly Construed, 49 U.S.C. § 323(a) Does Not Permit the Appointment of Coast Guard Military Appellate Judges.

Initially, we note that the statute relied on by the Government does not mention the office to be filled, or even describe with some particularity the category of covered officers, and thus arguably does not satisfy the "by law" requirement of the Appointments Clause. The provision for appointing inferior officers is an exception to the general rule, and was carefully considered by the Framers because of a concern about excessive diffusion of power and hence accountability. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 884-85 (1991). Surely, a catch-all appointment provision such as this does not constitute a considered judgment that any officer, let alone one as significant as a military appellate judge, should not be appointed by the usual means provided in the Constitution. And since most persons who work for the federal

government are neither principal nor inferior officers, but are employees whose appointments are not covered by the Appointments Clause, insisting on some degree of specificity in a law creating an alternate appointment mechanism will not present any significant practical problems.

But the Court need not decide that 49 U.S.C. § 323(a) does not support the appointment on that ground alone because there are far more fundamental reasons for rejecting the Government's interpretation, based on Article 66 of the UCMJ and other parts of Title 49. These provisions make clear, as we demonstrate below, that control over the appointment of military appellate judges was never intended to be lodged in the heads of their departments, but in the Judge Advocates General of the respective services.

Until *Weiss* caused the military to focus on the Appointments Clause, everyone treated Article 66(a) as the basis for appointing military appellate judges. Although it cannot constitutionally be used to appoint civilian judges, its existence is highly relevant because it brings forth the well-settled rule of statutory interpretation that, if two provisions deal with the same subject, one general in its application and the other specific, and the two provisions are in conflict, the specific provision governs. *Busic v. United States*, 446 U.S. 398, 406 (1980).

That is exactly the situation here. Both statutory provisions concern the appointment of officers of the United States within the Department of Transportation. One provision is general and one specific in terms of appointment of officers, and they would be in conflict if they both provided for different methods of appointing the same officers. Therefore, the specific provision, Article 66(a), must be given effect over the general provision, 49 U.S.C. § 323(a). As we now show, this reading is substantially bolstered by Article 66 as a whole and by the quite incongruous results that would occur if §323(a) were read as the Government suggests.

Article 66. The first and most striking anomaly is that some members of the Coast Guard Court of Criminal Appeals would be appointed by the General Counsel of the Department and the others by the Secretary, who is the General Counsel's superior. It is unusual, to say the least, for there to be different appointing authorities for members of the same appellate tribunal, or even of comparable non-judicial bodies, and it should not be assumed that Congress intended that result without a clear statement to that effect and some indication why Congress was doing so, neither of which exist. Indeed, allowing the Secretary to appoint civilian judges would enable him to overwhelm the military appointees since the General Counsel could hardly resist if the Secretary wanted to fill any vacancies that occurred with civilian rather than military appointees.

Apparently, the Secretary recognized this incongruity, and thus his 1993 appointment covered all five appellate judges for the Coast Guard — civilian and military. But that only compounds the problem because the statute is quite clear that only the President can appoint Coast Guard officers, 14 U.S.C. § 211(a), and under Article 66(a) only the Judge Advocate General can assign them to military courts. It may be that the attempt to appoint the military officers to the Court of Military Review was mere surplusage, and did not destroy a prior valid appointment, but at least it strongly suggests that Congress did not intend to create this double appointment system.

Second, under Article 66(a), the Judge Advocate General has the duty to "designate" the Chief Judge, yet here the Secretary has purported to take that assignment from his subordinate. Aside from any possible confusion of responsibilities, it would be extremely unusual for a lower ranking officer to choose among appointees, some made by him and others by his superior, for the position of Chief Judge for the Coast Guard Court of Criminal Appeals. Yet that is precisely what would happen if the specific mandates of Article 66(a) were followed, and if the Secretary were

allowed to appoint civilian members of the Court of Criminal Appeals.

Third, aside from specific incongruities in the appointments for the Courts of Criminal Appeals, the approach taken in Article 66 is to place military appellate judges under the overall supervision of the Judge Advocates General, not others in their Departments. Since these entities are appellate tribunals, dealing with the lives and liberties of persons convicted by courts-martial, it made great sense for Congress to remove them from the control of the Secretaries of the Departments, who are the penultimate (before the President) superiors of those who have brought the charges in the first instance.

Not only does that allocation of power minimize the possibility of undue Secretarial influence, but it also helps assure that those chosen for positions as military appellate judges are selected by individuals who are well-qualified to evaluate the quality of the legal work of the potential appointees. Given the apparent rationale for choosing the Judge Advocates General for this role, and the absence of any legislative history suggesting the contrary, there is no reason why Congress would authorize a different method of appointment when civilian judges were to be chosen. Furthermore, whenever any person is assigned a duty with respect to the Courts of Criminal Appeals — including the power to issue rules of procedure under Article 66(f) — the designee is a Judge Advocate General.

Indeed, it is difficult to believe that Congress, with no hearings and no input from the Coast Guard or its Judge Advocate General, let alone from the Code Committee established by 10 U.S.C. § 946 for the purpose of reviewing the military justice system and making recommendations to Congress about it, significantly altered the appointment process for appellate judges in the Coast Guard, and did so without mentioning that fact in the statute or, as we show below, in its legislative history. Despite all of this, the Government contends that Congress intended to allow the

Secretary to step into this carefully constructed system and appoint civilian judges, including the Chief Judge, who sits on every Coast Guard case, based solely on the catch-all language in § 323(a).

Yet another incongruity is based on what is *missing* from the comparable statutes governing the other military services. The Government seems to argue that, in enacting § 323(a), Congress intended to create a fallback system for the appointment of civilian appellate military judges. Although the Coast Guard was expected to be the principal user of civilian appellate judges, Article 66(a) is not limited to them, and there have been civilians on the Navy's appellate court. *See supra* note 2. To the best of our knowledge, there is no provision comparable to § 323(a) anywhere in Title 10 that would allow the civilian appointment of judges for the appellate tribunals for the other armed services. It is conceivable that, despite the mandate in Article 66(a) that civilian appellate judges for all four Courts of Criminal Appeals are to be appointed by their Judges Advocates General, Congress provided a fallback appointment power for the Coast Guard, but it is highly unlikely that it did so for the Coast Guard, but for no other service. Far more likely is that Congress never considered that § 323(a) would be used for this purpose. Given the specificity of Article 66(a), the Government's attempt to avoid the constitutional problem in following its mandate should not be permitted.

Title 49. There are a number of problems that would arise under Title 49 if § 323(a) were construed as the Government urges. First, reading § 323(a) in that sweeping a manner would mean that even the appointment of *principal* officers of the Department by the Secretary would be permitted, which would clearly be a violation of the Appointments Clause. Indeed, a number of officers who appear to be principal officers are specifically required to be appointed in the manner provided for principal officers. These include the Federal Aviation Administrator (49 U.S.C.

§ 106), the head of the National Highway Traffic Safety Administration (*id.* § 105), and the members of the Surface Transportation Board (*id.* § 701), which is the successor to the Interstate Commerce Commission. Surely, § 323(a) cannot be applied to them.

Similarly, the impropriety of using this statute for the appointments at issue here is apparent from several other provisions that relate to appointments of inferior officers of the Department. For example, the Secretary is permitted to appoint the Assistant Secretary for Administration under 49 U.S.C. § 102(e); the Deputy Federal Highway Administrator under § 104(b)(2); the Assistant Administrator of the Federal Highway Administration under § 104(b)(3); and the Deputy Administrator of the National Highway Traffic Safety Administration under § 105(b). These provisions would all be surplusage if § 323(a) were read as the Government urges. Therefore, there must be an implied, common sense exception in 49 U.S.C. § 323(a): the statute does not apply if the appointment of an officer is otherwise provided for by law. But that takes the Government back to the problem that caused the Secretary to attempt to appoint appellate military judges himself: their appointment *is* otherwise provided for in Article 66(a) of the UCMJ, but that provision is unconstitutional as applied to the appointment of civilians judges.

The last clause in § 323(a) further supports the position urged by petitioners -- that the entire provision does not apply when Congress has otherwise specifically spoken on the issue. That clause permits the Secretary, with respect to those officers and employees whom he is authorized to appoint and to fix their pay, to "prescribe their duties and powers." If the Government is correct that § 323(a) applies to the Coast Guard Court of Criminal Appeals, then the Secretary may also alter the duties of the civilian judges that he appoints and, by the same token, appoint the military judges and alter their powers and duties also, despite the clear mandates of Article 66. And, presumably, he could

also change the duties and pay for the other statutory officers in the Department noted on pages 17-18, *supra*. There is, however, nothing in § 323(a) that gives a hint that Congress intended to confer such sweeping authority in what is essentially a housekeeping measure. Thus, both Article 66 and Title 49 compel the conclusion that there is no basis to read § 323(a) to allow the Secretary to appoint civilians to the Coast Guard Court of Criminal Appeals. And, as we show below, although legislative history is not needed to establish this proposition, it "confirms" this analysis. *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991).[4]

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[4]Under 49 U.S.C. § 324(b) the Secretary may appoint, assign, or detail Coast Guard officers to positions in the Transportation Department, with three enumerated exceptions for high level positions, whose appointments are otherwise provided for in the Department of Transportation Act. The exceptions are for the position of Secretary, which must be filled by the President with the advice and consent of the Senate (§102(b)); the Deputy Secretary, who is similarly appointed (§102(c)); and the Assistant Secretary for Administration, who must be "appointed in the competitive service by the Secretary, with the approval of the President" (§102(2)). The absence of an exclusion for the Coast Guard Court of Criminal Appeals should not suffice to overcome the alternative specific method of appointment otherwise provided for by Article 66(a), both because it is in a different Title of the U.S. Code (and hence may have been overlooked) and because it would still leave other incongruities noted in the text. In any event, it would not cure the problem of civilian appointments, unless the individual was a retired Coast Guard officer, who was also qualified to serve as a military judge. *See* § 324(b)(final sentence) and Article 66(a) (requiring bar membership). And, of course, use of this provision would still have to reconciled with the specific requirements of Article 66(a).

B. The Legislative History Confirms That § 323(a) Does Not Permit the Appointment of Civilian Appellate Military Judges.

There are two statutes whose legislative histories might support the Government's position, but in fact neither of them does. Thus, the history of § 323(a) might reveal an intent to apply in situations such as this, or the history of Article 66 might argue for a more narrow reading of its reach. However, to the extent that their origins shed any light on the question presented, they tend to favor petitioners.

The history of § 323(a) begins with the history of the Coast Guard. The U.S. Coast Guard originated as the United States Revenue Cutter Service, created by Congress as part of the Department of the Treasury, in the Tariff Act of August 4, 1790 (1 Stat. 175). On May 26, 1906, in an act providing for the regulation of enlistment and punishments in the Revenue Cutter Service, Pub.L. 59-178, 34 Stat. 200 (1906), Congress provided the first statutory authority for a system of disciplinary law within the Service. 27 *The Coast Guard at War*, 1 (1951) (hereinafter "*Coast Guard at War*"). The Act provided for Revenue Cutter Service courts to punish only twenty-one specified misdemeanor-type offenses, and it required the Secretary of the Treasury to turn over offenders who committed more serious crimes to the civilian authorities.

In the historical context in which the Act of 1906 was passed, the judgment of a court-martial was essentially a recommendation, without effect until reviewed and acted upon by the officer that convened the court in the first place. *See* Winthrop, *Military Law and Precedents*, 447 (2d ed 1920). Consistent with the prevailing approach to military justice, the Act provided that all courts were convened by the Secretary of Treasury, and the proceedings, findings, and sentences were subject to review by the Secretary. Indeed, no portion of any punishment imposed by the courts could be executed until approved by the Secretary, and the Secretary

interpreted these duties to be non-delegable. *See generally, Coast Guard Courts and Boards § 590 (1935) (hereinafter "Coast Guard Courts").* While the Secretary was required to make a "review," the review was not a judicial one. Neither the Act of 1906, nor the Secretary's own guidebooks for implementation of the Act, specified whether particular standards of review applied, nor mentioned a scope of review, spoke of the purpose of the review, or actually guaranteed a person convicted by a general or summary court an opportunity to be heard post-trial as a matter of right. *See Coast Guard Courts* at §§ 590-600. The statute did not require, or even mention, that post-trial review should be conducted by appellate courts or boards. Once the Secretary of Treasury took action and a sentence was approved, there was literally no other tribunal to which an appeal could have been taken. *Id.* at §34.

The Revenue Cutter Service was combined with the Life Saving Service to form the Coast Guard in 1915, and was declared to be "a military service and a branch of the armed forces of the United States at all times." Act of January 28, 1915 (38 Stat. 800), 14 U.S.C. §1. Thereafter, the Act of June 5, 1920 established lesser courts known as "deck courts", but neither that Act nor any subsequent legislation made any other changes in the system by which courts-martial were reviewed in the Coast Guard until the UCMJ was enacted in 1950.[5]

This history of no meaningful appellate review in the Coast Guard prior to the UCMJ makes it clear that, if Congress intended to assign the Secretary of Transportation any role in the appellate processes of the Coast Guard court-

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[5]The Coast Guard was transferred from the Department of Treasury to the Navy on November 1, 1941, which resulted in a temporary shift in its disciplinary system to that of the Articles for the Government of the Navy. After World War II was over, the Coast Guard was returned to the Department of Treasury. *See Coast Guard at War* at 1, 4.

martial system, it would have had to have done so in the statutes creating the Transportation Department. But a review of that legislation fails to produce any such evidence.

What is now § 323(a) was originally §9(a) of the Department of Transportation Act of 1966, which established the Department and moved the Coast Guard into it. Pub. L. 89-670, §9(a), 80 Stat. 931 (1966). It provided:

> In addition to the authority contained in any other Act which is transferred to and vested in the Secretary, the National Transportation Safety Board, or any other officer in the department, the Secretary is authorized, subject to the civil service and classification laws, to select, appoint, employ, and fix the compensation of such officers and employees *as are necessary to carry out the provisions of this Act* and to prescribe their authority and duties. (Emphasis added).

This provision was later codified at 49 U.S.C. §1657(a).

In 1982, Congress revised Title 49 for the purpose of restating "in comprehensive form, without substantive change" certain general and permanent laws related to transportation." Office of the Law Revision Counsel, Detailed Explanation of Revision of Title 49 U.S.C.A., reprinted in 1982 U.S. Code, Cong., & Admin News 4220. The revision was part of a program to substitute plain language for awkward and outdated provisions, and to eliminate superseded, obsolete, or unneeded statutes. Certain provisions were consolidated "to conform to common contemporary usage." *Id.* at 4221. As part of this change, 49 U.S.C. §1657(a) was revised into the current 49 U.S.C. § 323(a), to read:

> The Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers.

Nothing in this history suggests that the Secretary was being given any powers whatsoever regarding courts-martial appeals, either from the Treasury Department or from

Congress directly in 1966 or 1982. If anything, the overall thrust of the 1966 provision emphasizes that it was little more than a catch-all device, designed to assure that nothing fell between the cracks in the transfer process. Indeed, the phrase governing the appointment power applies only to those which "are necessary to carry out the provisions of this Act," could quite reasonably be read not to apply at all here since these appointments are made to carry out another act, the UCMJ of 1950. We do not ask the Court to decide this case on the basis of that phrase alone, but we do believe that this history reinforces the conclusion that § 323(a) has nothing to do with appointing civilian judges for the Coast Guard Court of Criminal Appeals.

That leaves the UCMJ's provisions on appeals as a possible source for the appointment power exercised here, or at least for some evidence that Congress did not intend to confine the appointment process for military appellate judges to that contained in Article 66(a). Once again, however, nothing in the history of Article 66 helps the Government.

The original language of Article 66(a), effective May 31, 1951, stated that the "Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians... ." In its Report, the Armed Services Committee made a special comment relevant to these newly created Boards: if adopted, the Code "will be the sole statutory authority for...[t]he review of findings and sentence and the creation and constitution of the reviewing tribunals." Senate Committee on Armed Forces, Uniform Code of Military Justice Act of 1950, S. Rep. No. 486, 81st Cong., 2d Sess. (1949), reprinted in 1950 U.S.C.C.S. 2223. Regarding the role of the Coast Guard in the formulation of the language of Article 66, the Committee noted that "the provision permitting civilian members has been added for the Coast Guard." *Id.*

Since its implementation, this portion of Article 66(a) dealing with the creation of military appellate tribunals was

twice modified. The Military Justice Act of 1968 changed the phrase "shall constitute in his office one or more boards of review" to read, "shall establish a Court of Military Review which shall be composed of one or more panels. . . ." Pub. L. 90-632, § 866 (1968). The other amendment was simply a name change to the Court of Criminal Appeals from the Court of Military Review. Pub. L. 103-337, § 924 (1994).

Once again, this history provides no support for the proposition that Article 66(a) should be read as anything but the exclusive means by which individuals may become members of military appellate tribunals. No one disputes that, since 1951, all appointees to the Coast Guard appellate tribunals and to those of the other services were made by the Judge Advocates General pursuant to Article 66(a), and that nothing was changed in 1966 when the Transportation Department was created, nor in 1982, when minor changes were made to what is now § 323(a). Furthermore, the Senate Committee that spoke directly to the issue of alternative appointments of civilian judges expressed its belief that the amendment was needed to authorize their appointment, thereby eliminating any doubt that there was any pre-1951 authority that might have been carried forward. In sum, the legislative history confirms that Article 66(a) is the sole source of appointments for the Courts of Criminal Appeals and that 49 U.S.C. §323(a) contains no authorization for the Secretary of Transportation to cure the constitutional deficiency in Article 66(a) as applied to civilian judges.

Finally, reading § 323(a) as conferring appointing authority in the manner proposed by the Government is at odds with the principle that the lines of appointment be clearly marked. For one thing, the Government's argument trivializes the office of appellate military judge by suggesting that Congress intended that civilian military judges be appointed pursuant to a catch-all provision empowering the Secretary of Transportation to appoint employees and officers of the Department. Insofar as we are aware, no one

occupying a comparable position of responsibility — which calls for literally the exercise of life-or-death power over military personnel like petitioners — is appointed under such a generalized, residual appointing statute. To the contrary, most judges are appointed pursuant to highly specific grants of authority that clearly identify the appointing official and set forth a process for the appointment. It is not simply a matter of erroneous statutory interpretation to accept the Government's interpretation of § 323(a), but an affront to the principle of accountability underlying the Appointments Clause to rely on a general statute when Congress clearly intended a completely different law to apply.

II. THE JUDGES OF THE COURTS OF CRIMINAL APPEALS ARE PRINCIPAL OFFICERS WHO MUST BE APPOINTED BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE.

If this Court rejects petitioners' statutory argument, then it must decide whether the judges of the Coast Guard Court of Criminal Appeals are principal officers of the United States, who must be appointed by the President with the advice and consent of the Senate, not by the Secretary of Transportation. There is almost no constitutional history that sheds light on the meaning of the term inferior officer, and the only decision of this Court that deals directly with the issue is *Morrison v. Olson*, 487 U.S. 654 (1988), with which we begin our discussion. Thereafter, we turn to *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), where, although the Court did not speak on this precise issue, the assumptions underlying both of the opinions further support our claim. In our analysis of both cases, we will refer to the concurring opinion of Justice Souter in *Weiss*, 114 S. Ct. at 763-769, which concluded that all military judges are inferior officers.

As Justice Story observed, "In the practical course of the government there does not seem to have been any exact line drawn, who are and who are not to be deemed *inferior* officers, in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate." 1 J. Story, *Commentaries on the Constitution of the United States: A Preliminary Review* § 1536 p. 337 (2d ed 1851)(emphasis in original). This Court's decision in *Morrison* made the line somewhat clearer by ruling that principal officers are not limited to those specified as such in the Constitution. Nor are they limited to those listed in the Constitution as offices to which Congress may assign the power of appointing inferior officers, although the implicit assumption is that *at least* those who have the power of appointing inferior officers must themselves be principal officers.[6]

Since *Morrison* held that independent counsels are inferior officers, we first focus on the characteristics of that

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[6]We recognize that Justice Souter in *Weiss* observed that "it may be that the Appointments Clause envisions the appointment of some inferior officers by other inferior officers," 114 S. Ct. at 768. However, there was no citation for that proposition, and it seems fundamentally inconsistent with the admitted purpose of confining the appointing power to those designated in the Appointments Clause itself, to prevent the diffusion of power and hence accountability. *Freytag*, 501 U.S. at 884-85. It is also inconsistent with the little constitutional history on this issue. Thus, James Madison unsuccessfully objected to the limitation on appointments of inferior officers because it did "not go far enough if it be necessary at all — Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 *The Records of the Federal Convention of 1787* 627 (M. Farrand rev. 1966). Of course, inferior officers may appoint "employees" of the United States since they do not need to meet the requirements of the Appointments Clause. *Freytag*, 501 U.S. at 881.

office and then compare them to the position of military appellate judges. As we read *Morrison*, the most significant factors in favor of treating independent counsels as inferior officers were the strict limits on the jurisdiction of her office, the limited term of the office, and the presence of a readily identified superior officer to whom the independent counsel was required to look for guidance on matters within her jurisdiction and who had the power to remove her for cause. 487 U.S. at 671-72. While the characteristics of the office of military appellate judge and independent counsel are quite different, a comparison between them demonstrates that the former have at least as much, if not more, unsupervised authority under the laws of the United States than do the latter.

Subject matter jurisdiction: Independent counsels are limited in the areas of their investigations to what the Attorney General recommends, and then to what the Special Division authorizes them to investigate. Indeed, the statute prescribes a fairly narrow group of persons who can be made the subject of an independent counsel's investigation, and even then only some federal crimes can trigger an appointment of an independent counsel. 28 U.S.C. § 591(a) & (b). If additional crimes turn up during an investigation, the independent counsel must seek permission to expand her jurisdiction to include them.

By contrast, the judges of the Courts of Criminal Appeals hear the entire range of criminal appeals involving violations of the entire UCMJ, as well as other federal and states laws. Thus, Article 134, 10 U.S.C. § 934, proscribes "all disorders and neglects to the prejudice and good order and discipline in the armed forces," as well as "crimes and offenses not capital," which has been construed to include other federal crimes not covered in the UCMJ, including violations of state law which are covered by the Assimilative Crimes Act, 18 U.S.C. § 13. And, like other appellate tribunals reviewing criminal convictions, military appellate

judges are regularly faced with constitutional challenges that must be resolved.

Term of Office: Independent counsel's offices are intended to exist as entities for only brief periods of time, generally a year or two, although several have lasted considerably longer. Many of those who have been appointed as independent counsels have not assumed the office as a full-time job, although some have. And when the investigation that led to their appointment is concluded, it is not just the person who was named as independent counsel whose work is completed, but the entire office is terminated.

By contrast, Article 66(a) requires the permanent establishment of Courts of Criminal Appeals for each branch of the armed services. Chief Judge Baum, who sits on every appeal, has served since 1985, and when he leaves or, more likely, retires, he will be replaced by another judge; other civilian judges in the Coast Guard have also served lengthy terms, running from nearly nine years to over twenty-six. *See* note 3, *supra*. This pattern suggests that at least civilian appellate judges can be expected to remain in office as long as they continue to perform competently. Although military appellate judges in the Coast Guard tend to serve shorter periods of time, and they generally have other non-judicial assignments, their positions continue to be filled when they are no longer serving as judges, just the same as other federal offices, except temporary ones like independent counsels.

Supervision by Others: Although independent counsels are appointed by a court, they may be removed only by the Attorney General for cause. 28 U.S.C. § 596(a)(1). Most significantly, independent counsels are required to follow Justice Department policies and procedures in carrying out their duties, *id.* § 594(f), so that they are, in essence, an arm of the Justice Department, but with added independence based on their appointment and the limitation on their removal except for cause.

But the greatest contrast with independent counsels is the total lack of supervision by anyone, including the appointing officers, over the daily work of the Courts of Criminal Appeals. To be sure, like independent counsels, they do not make policy, and the discretion they exercise is very different from policymakers in the executive branch. But those differences apply to all judges, even those with Article III status who are clearly principal officers. Like the Circuit Courts of Appeals, there is no other court to which an appeal of right can be taken by military personnel who are convicted by a court-martial. Thus, absent waiver by an accused, the Courts of Criminal Appeals are required to review all cases in which the death penalty, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Article 66(b).

This review is particularly important because the powers of the Courts of Criminal Appeal are far broader than those of the Circuit Courts of Appeals in comparable federal criminal cases. Thus, under its controlling statute, a Court of Criminal Appeals "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Article 66(c). Specifically, it "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." *Id.* In short, military appellate judges exercise all of the traditional powers of appellate courts, as well as an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990).

Furthermore, if the judges of the Courts of Criminal Appeals are inferior officers, who are their superiors? The services, including the officers who appoint the judges of the Courts of Criminal Appeals, are bound to carry out their decisions unless reversed or modified in some way by a superior court. *See* Arts. 66(e), 75, UCMJ. The decisions

of the Courts of Criminal Appeals, in the vast majority of cases, are subject to review only upon the grant of a petition for review by the Court of Appeals for the Armed Forces, Art. 67(a), UCMJ, 10 U.S.C. § 867(a), and from FY 1991 though FY 1994 that Court decided between 2 and 4% of the number of cases decided by the Courts of Military Review. See *Annual Reports*, the U.S. Court of Military Appeals and the Judge Advocates General of the Army, Navy, Air Force and Coast Guard, *reprinted at* 32 M.J. CXXV-CXCVIII; 34 M.J. LXIII-CXLIII; 38 M.J. CXXI-CXCIII; 39 M.J. CIX-CLXXV; and 43 M.J. CLXXXIX-CCLXII. Moreover, that power of review is limited to actual cases, unlike the routine supervisory authority that Department Heads exercise over those who work for them.[7]

Another key factor present in *Morrison* is absent here. In both the original independent counsel statute passed in 1978 and in its two short-term renewals, *Morrison*, *supra*, 487 U.S. at 660 n.1, Congress made a "considered judgment" that independent counsels were inferior officers, consistent with the requirements of the Appointments Clause. *In re Sealed Case*, 838 F.2d 476, 532 (D.C. Cir. 1987)(R. Ginsburg, J., dissenting). Here, as described in Point I, there was never any discussion of the Appointments Clause status of military appellate judges, let alone a specific determination by Congress, based on the powers that military appellate judges exercise, that they were inferior and not principal officers.[8]

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[7] Review of decisions in a court-martial is available in this Court only where the Court of Appeals for the Armed Forces has reviewed the case. 28 U.S.C. § 1259.

[8] The absence of consideration of the Appointments Clause may be due to the fact that Article 66 was enacted in 1950 and amended in 1968, both before this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), put real teeth into that Clause and made (continued...)

To the extent that the Court deems it appropriate to give Congress some deference on its interpretation of the Appointments Clause as applied to the status of particular offices — on the theory that at least the Senate is surrendering some power by giving up the right to advise and consent on particular nominations — such deference should apply only when Congress has made an explicit judgment on the issue, as it did in *Morrison*. While it may be true, as Justice Souter observed in his concurrence in *Weiss*, that Congress and the President "didn't think [military judges] were principal officers," *Weiss*, 114 S. Ct. at 769, that is because they did not think about the question at all, not because they weighed all the relevant evidence regarding the status of military appellate judges and reached the contrary conclusion.

This Court's post-*Morrison* decision in *Freytag* further supports our position that military appellate judges are principal officers. The issue in *Freytag* of relevance here was whether special trial judges, appointed by the Chief Judge of the Tax Court, were appointed in accordance with the Appointments Clause. After rejecting the Commissioner's argument that the judges were mere employees, the Court unanimously upheld their appointment, although the Court divided 5-4 on whether the Tax Court was a court of law or a department under the Appointments Clause.

Although Justice Souter has suggested otherwise (*see*, *supra* note 6), we believe that implicit in the notion of a limited category of officials who can be designated the power to appoint inferior officers is that all of those appointing persons are themselves principal officers. To rule otherwise would suggest that, although the Framers were willing to

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[8](...continued)
it clear that it is the exclusive means by which all officers of the United States must be appointed. *Id.* at 126.

allow only a small group of officers to substitute for the President in the appointment process, and to do so without Senate oversight on individual appointees, it was willing to allow persons who were not themselves principal officers, and hence not subject to Presidential appointment and Senate confirmation, to appoint inferior officers, if Congress agreed. In our view, the far more logical assumption is that the Framers carefully constructed a hierarchy in which principal officers are all appointed as provided by the basic Appointments Clause process and that only those who have been through that process, and otherwise meet the restrictions on persons to whom the appointment power may be delegated by law, may appoint inferior officers. On that basis, the judges of the Tax Court must be principal officers in order for the Chief Judge to be entitled to appoint special trial judges.

Tax Court judges are appointed by the President with the advice and consent of the Senate, 26 U.S.C. § 7443, but that fact alone is not dispositive since the Constitution requires that all officers, inferior as well as principal, be appointed in that manner, unless Congress decides, "by Law," to permit an alternative method to be used for a particular office. The Government never suggested in *Freytag* that Tax Court judges were *not* principal officers, and given the breadth of their tasks and the importance of their work, we doubt that any such claim could be sustained. Indeed, this Court analogized Tax Court judges to District Court judges who surely are principal officers. 501 U.S. at 891-92.

But if judges of the Tax Court are principal officers, then the civilian and military judges of the Courts of Criminal Appeals must be in the same category. The subject matter areas of their respective jurisdictions differ in topics, but not in breadth. While Tax Court judges are appointed for fixed terms, and thus could be said to be more permanent, the positions of the judges on both sets of courts are permanent, and only the appointees come and go, in

contrast to the offices of independent counsel which are, by definition, temporary. Neither the Tax Court nor the Courts of Criminal Appeals have day-to-day supervisors, or for that matter anyone who gives them policy directives of any kind, outside the context of decisions in specific cases.

But if there is a single factor that distinguishes military appellate courts from the Tax Court, it is that there is an appeal as of right to a Circuit Court of Appeals from every Tax Court decision, whereas decisions of the Courts of Criminal Appeals are reviewable only by permission, which is not often granted. And the Courts of Criminal Appeals decide on the liberty and in some cases the life of the accused, in contrast with the Tax Court whose cases deal only with money. Accordingly, if Tax Court judges are principal officers, then the case for military appellate judges having that same status is *a fortiori*.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded so that a properly constituted panel of the Coast Guard Court of Criminal Appeals can hear the appeals of these six petitioners.

Respectfully submitted,

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December 23, 1996

ADDENDUM

UNITED STATES, Appellee,
v.
James D. RYDER, Boatswain's Mate Second Class
U.S. Coast Guard, Appellant.

No. 68449
CMR No. 947

U.S. Court of Appeals for
the Armed Forces

Argued Oct. 31, 1995.

Decided April 15, 1996.

Opinion of the Court

GIERKE, Judge:

A general court-martial convicted Boatswain's Mate Second Class Ryder of numerous drug offenses. His approved sentence provided for a dishonorable discharge, confinement for 3 years, partial forfeitures for 36 months, and reduction to the lowest enlisted grade. The Court of Military Review set aside the findings of guilty as to one specification and dismissed it, affirmed the remaining findings of guilty, reassessed the sentence, and found it "legally correct and appropriate for the remaining offenses." 34 MJ 1077, 1082 (1992).

The Court of Military Review subsequently granted Ryder's motion for reconsideration and entertained three additional assignments of error, including an assertion that the appellate military judges on that court were not validly appointed under the Appointments Clause of the Constitution. That court held that its judges were validly appointed. 34 MJ 1259 (1992).

Our Court held in *United States v. Carpenter*, 37 MJ 291, 295 (1993) *vacated*, __ U.S. __, 115 S.Ct. 2572, 132 L.Ed.2d. 823 (1995), that civilian judges on the court below were not validly appointed but their actions were valid *de facto*. *See Buckley v. Valeo*, 424 U.S. 1, 142, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). We applied *Carpenter* to Ryder's case. *See* 39 MJ

454, 455 n. * (1994). The Supreme Court unanimously reversed, holding that the civilian judges' actions were not valid *de facto*. The Court remanded Ryder's case for another "hearing before a properly appointed panel" of the Coast Guard court. *Ryder v. United States*, _ U.S. __, __, 115 S.Ct. 2031, 2038, 132 L.Ed.2d 136 (1995).

Following remand of the case from the Supreme Court, our Court concluded that it was necessary to determine whether the present Coast Guard Court of Criminal Appeals is properly constituted before remanding Ryder's case to that court for further proceedings. We ordered the Government to show cause whether the Secretary of Transportation has statutory authority to appoint judges of the Coast Guard Court of Criminal Appeals. 43 MJ 181 (1995). We now hold that the judges of that court are validly appointed.

Before our Court, the Government argued that judges of the Court of Criminal Appeals are "inferior officers" of the United States who may be appointed by a department head if authorized by Congress; that the Secretary of Transportation has authority under 49 USC § 323(a) to appoint inferior officers; and that the Secretary of Transportation has properly exercised his appointment power to appoint the judges of the Coast Guard Court of Criminal Appeals. Response to Order to Show Cause at 6-9. Appellate defense counsel argued that appellate military judges are "principal" officers who must be nominated by the President and confirmed by the Senate, Answer at 4-8; in the alternative, he argued that if appellate military judges are "inferior" officers, 49 USC § 323(a) is not a sufficient enabling statute to permit the Secretary of Transportation to appoint appellate military judges. Answer at 9-12. Finally, appellate defense counsel argued that 49 USC § 323(a) and Article 66(a) are "in conflict," since the former is a general grant of authority to the Secretary of Transportation, but the latter is Congress' specific directive to the service Judge Advocates General to appoint judges to the Court of Criminal Appeals. Ryder's counsel argued that Article 66(a) reflects Congress' intent to give the power to appoint judges to the Judge Advocate General, not the Secretary. Answer at 12-15.

In *Weiss v. United States*, 510 U.S. 163, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) the Supreme Court held that assignment of military officers to judicial duties does not require a second

appointment under the Appointments Clause. Left open was the question whether assignment of a civilian to a Court of Criminal Appeals by the appropriate Judge Advocate General complied with the Appointments Clause. *Id* at ___ n. 4, 114 S.Ct. at 757 n. 4. The Supreme Court has since held in *Ryder v. United States*, *supra*, that it did not.

Two questions are now before us. First, are the judges of the Coast Guard Court of Criminal Appeals principal officers or inferior officers under the Appointments Clause? Second, if they are inferior officers, has Congress given the Secretary of Transportation authority to appoint them?

The line between principal officers and inferior officers is "far from clear." *Morrison v. Olson*, 487 U.S. 654, 671, 108 S.Ct. 2597, 2608-09, 101 L.Ed.2d 569 (1988). The Supreme Court uses a functional analysis to determine whether an officer of the United States is a principal officer or interior officer under the Appointments Clause. *See id.* at 671, 108 S.Ct. at 2608-09. Applying a functional analysis to appellate military judges, we note that the jurisdiction of judges of the Court of Criminal Appeals is limited to violations of the Uniform Code of Military Justice and the Law of War by persons subject to military jurisdiction. The judges are dependent on the General Counsel (who is the Judge Advocate General for the Coast Guard) for assignment to the court. They do not enjoy tenure and thus may be reassigned to other duties. They may hold other positions as their primary duty and serve only part-time as appellate military judges. *See United States v. Carpenter*, 37 MJ at 296.

While good arguments can be made for both sides of the question, we agree with Justice Souter's approach in *Weiss*:

> Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political Branches' judgement is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause.

_ U.S. at __, 114 S.Ct. at 769 (concurring). *See In re Sealed Case*, 838 F.2d. 476, 532 (D.C.Cir. 1988) (R.B. Ginsberg, J., dissenting), *reversed sub nom. Morrison v. Olson*, *supra*, cited by Justice Souter in *Weiss* ("Where ... the label that better fits an

officer is fairly debatable, the fully rational congressional determination surely merits ... tolerance." __ U.S. at __, 114 S.Ct. at 769); *see also United States v. Weiss*, 36 MJ 224, 240 (CMA 1992) (Sullivan, C.J., dissenting on other grounds) ("Military judges, both trial and appellate, are 'inferior Officers' . . ."). Since military officers assigned to a Court of Criminal Appeals are inferior officers, we conclude that civilian judges assigned to that court, who perform the same duties, are likewise inferior officers and are not required to be appointed by the President and confirmed by the Senate.

We turn next to the question whether Congress has given the Secretary of Transportation authority to appoint judges of the Court of Criminal Appeals. The Government argues that 49 USC § 323(a), empowering the Secretary to "appoint . . . officers and employees of the Department of Transportation" enables the Secretary to appoint civilian members of the Court of Criminal Appeals. The defense argues that the 49 USC § 323(a) is overly broad and that Congress intended Article 66, UCMJ, 10 USC § 866, a more specific statue that vests the appointment power in the Judge Advocates General, to control appointments to the Court of Criminal Appeals.

As with other courts, the power to establish a court is separate from the power to appoint judges. In *Weiss v. United States, supra*, the Supreme Court rejected the defense interpretation of Article 66 when it said, "The sections of the UCMJ relating to military judges speak explicitly and exclusively in terms of 'detail' or 'assign'; nowhere in these sections is mention made of a separate appointment." __ U.S. __, 114 S.Ct. at 758. Military officers are appointed by the President, not the Judge Advocate General. *See* 10 USC §§ 531 and 624, and 14 USC § 211. The Judge Advocate General is commanded by Article 66(a) to "establish a Court of Criminal Appeals" and assign judges to that court. Article 66 says nothing about the power to appoint. Accordingly, we reject the argument that Article 66 reflects congressional intent to vest in the Judge Advocate General the power to appoint appellate military judges.

In *United States v. Carpenter*, 37 MJ at 294, we opined that "the Appointments Clause would be satisfied if the Secretary of Transportation appointed the judges of the Coast Guard Court of Military Review." We adhere to that view. Congress has given

the Secretary of Transportation broad authority in 49 USC § 323(a) to "appoint . . . officers and employees of the Department of Transportation." In our view, this includes civilian judges of the Coast Guard Court of Criminal Appeals. The Secretary's adoption of the General Counsel's assignment of military officers to the Court of Criminal Appeals may have been redundant but does not affect the validity of his appointment of civilians as appellate military judges. Accordingly, we hold that the Secretary's appointment of civilians as appellate military judges is consistent with the Appointments Clause.

In accordance with the Supreme Court's mandate, the decision of the United States Coast Guard Court of Military Review [34 MJ 1077, 1259] is set aside. The record of trial is returned to the General Counsel of the Department of Transportation for review under Article 66, Uniform Code of Military Justice, 10 USC § 866, by a properly appointed Court of Criminal Appeals. Thereafter, Article 67, UCMJ, 10 USC § 867 (1989) will apply.

Chief Judge COX, Judges SULLIVAN and CRAWFORD, and Senior Judge EVERETT concur.

Memorandum

U.S. Department of Transportation

Office of the Secretary of Transportation

Subject: APPOINTMENT OF APPELLATE MILITARY JUDGES
Date: January 15, 1993

From: S/
The Secretary

Reply to Attn of:

To: Chief Judge, U.S. Coast Guard Court of Military Review

1. The assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own. Those judges presently assigned and appointed by me are:

Chief Judge
Joseph H. Baum

Judges
Alfred F. Bridgman, Jr.
Michael C. Grace
Terrance M. Edwards

The judicial duties and powers of these judges will be as prescribed under the Uniform Code of Military Justice.

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
UNITED STATES GOVERNMENT

memorandum

Subject: UNITED STATES COAST GUARD COURT OF MILITARY REVIEW

Date: March 18, 1985

From: General Counsel

To: Chief Counsel, U.S. Coast Guard

1. The United States Coast Guard Court of Military Review, established by memorandum of General Counsel of August 12, 1969, and amended by subsequent memoranda, and as reestablished by memorandum of the General Counsel of April 12, 1977, is continued. However, the following additional amendment is made concerning personnel assigned as appellate military judges effective 1 April 1985:

Mr. Joseph H. Baum;
Mr. Alfred F. Bridgman, Jr.;
Captain Christopher M. Holland, USCG;
Captain Frederick F. Burgess, Jr., USCG; and
Commander Robert J. Reining, USCG.

2. Effective 1 April 1985, Mr. Joseph H. Baum is designated as Chief Judge of the Court.

3. Cases not yet taken up by the court shall be heard by the court as established with the amendment made by this memorandum. These cases are presently: *United States v. Castelani*; *United States v. Bealieu*; *United States v. Giusti*; *United States v. Beasley*; *United States v. Dubois*; *United States v. Baker*; *United States v. Kurtz*; *United States v. Breseman*; *United States v. Miramontes*; *United States v. Azevedo*; *United States v. Madison*; *United States v. Berry*; *United States v. Payne*; *United States v. Morgan*; *United States v. Miller*; and all others subsequently referred.